Mr Clidero, for the applicants, says that there has been a change of circumstances since these two unsuccessful applications were heard. He says, first, that there is now available to this court a medical report, which was not available on the earlier hearings, which shows or at least suggests that the complainant may not have been raped at all, whether by these applicants or by anybody else. It is not for me to evaluate the medical report. It will be a matter for the trial judge to decide the question whether the intercourse (which is admitted) took place with or without the complainant's consent. However, there is no doubt that the report is, to say the least, consistent with intercourse having taken place with the consent of the complainant.

Secondly, Mr Clidero goes on, the case was originally due to come before the court for a preliminary inquiry on 13 June 1988, but that hearing has had to be adjourned. I am told by the prosecution that the inquiry will now take place on 25 July 1988, a delay of some six weeks. From my recital of the chronology, it will be apparent that these three applicants have already been in custody for a considerable time. One of them has five children of his own.

Understandably, the complainant is concerned that she shall not be harassed by these applicants or indeed anybody else. Rape has a traumatic effect on the victim and the court must be careful to ensure that, between the date of an alleged offence of rape and the date of the hearing, the victim is offered a fair and proper degree of protection, but in my judgment that cannot be such a degree of protection as warrants the incarceration for months (unless there is other good cause) of persons who may, for all the court knows, be innocent of the offence.

In these circumstances, I propose to grant bail upon conditions. I will impose as a condition of the grant of bail that these three applicants should each of them report once in the morning and once in the evening to the nearest police station on the understanding that that police station is not more than 1½ miles away from the place where each of them lives.

I also propose to make it a condition of granting bail that they do not approach near the premises where the complainant lives. I want it to be quite clear that they are to keep well away from the complainant. Subject to those conditions, I propose to allow this application, and I will discuss further details with counsel.

Order accordingly.

Solicitors: *David Clidero & Co.*

Reported by *Ng Sheau Jiuan*

MALAYSIAN REPORTS

Malaysia Building Society Bhd v Lesco Development Corpn Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C8369 OF 1985
SITI NORMA YAAKOB J
5 AUGUST 1988

Civil Procedure – Judgment in default of appearance – Application to vary – Interest awarded in excess of statutory rate – Whether judgment a nullity – Whether court has jurisdiction to vary judgment to reflect the correct rate of interest – Condition that defendant will not be prejudiced by such amendment – Rules of the High Court 1980, O 2 rr 1 & 2, O 42 r 12

The plaintiff obtained a judgment in default of appearance against the first defendant for the principal sum claimed together with interest at 13.5% pa. However, under the then O 42 r 12 of the Rules of the High Court 1980, the only rate of interest allowed on a judgment sum was 8% pa. On realizing that the judgment carried the wrong interest rate, the plaintiff applied to have the judgment varied under O 20 r 11 and under the inherent jurisdiction of the court, so as to reflect the correct rate of interest. The application was allowed by the senior assistant registrar and the first defendant appealed against this decision.

Held, dismissing the appeal: (1) The effect of non-compliance with O 42 r 12 of the Rules of the High Court 1980 does not render the judgment a nullity as O 2 r 1 treats such failure to be an irregularity which can be remedied under r 2 of the same order. The court is empowered to cure such a judgment provided that the first defendant will not be in any way prejudiced by such an amendment.

(2) The first defendant has already applied to have the same judgment set aside (on other grounds) and the matter was pending when the appeal was heard. Since the amendment does not have the effect of preventing the first defendant from proceeding with this pending and separate application, it cannot be said that the first defendant will be unduly prejudiced by the amendment.

Legislation referred to
Rules of the High Court 1980 O 2 rr 1 & 2, O 20 r 11, O 42 r 12

G Krishnan for the first defendant/appellant.
Grace Lim for the plaintiff/respondent.

Cur Adv Vult

Siti Norma Yaakob J: The only issue that merits consideration in this appeal is whether the court has any curative jurisdiction to vary a judgment in default of appearance, so as to show the correct rate of interest after judgment.

There were other issues raised, particularly as to whether the judgment is a nullity as the first defendant contended that the certificate of non-appearance was issued before the period of entry of appearance had expired. I had restrained from directing my mind on these

issues as there was a pending and separate application to have the same judgment set aside for which the very same issues were pleaded and which would be more relevant in that application than in the appeal before me. To that end I had directed my mind solely on the issue as to whether I have the necessary jurisdiction to vary the judgment so as to reflect the correct and permissible rate of interest after judgment.

The judgment in default of appearance was entered against the first defendant on 31 January 1986 for the principal sum claimed together with interest at 13.5% pa on monthly rests from 31 October 1985 to date of realization and costs at $225. The rate of interest embodied in the judgment is the same as that pleaded in the statement of claim.

As at 31 January 1986, the only rate of interest allowed on a judgment sum was 8% pa under O 42 r 12. However, since 12 December 1986, O 42 r 12 has been amended to give jurisdiction to the courts to grant interest on judgment sums in excess of 8% pa where the parties have contractually agreed to such payment.

The plaintiff only became aware that the judgment carried the wrong rate of interest when the first defendant applied to have the judgment set aside and has raised as an issue the imposition of 13.5% interest pa as being compound interest contrary to s 11 of the Civil Law Act 1956. This had prompted the plaintiff to apply to have the judgment varied under O 20 r 11 and under the inherent jurisdiction of the court, so as to reflect the correct rate of interest, an application that was allowed by the senior assistant registrar on 2 February 1988.

Clearly the judgment has not complied with O 42 r 12 but the effect of such non-compliance does not render the judgment a nullity, as O 2 r 1 treats such failure to be an irregularity which can be remedied under r 2 of the same Order, by the court setting aside either wholly or in part the proceedings on which the failure occurred or amending or varying the judgment or order dealing with such failure. Thus the power to cure an irregular judgment is no longer confined to the slip rule under O 20 r 11, which is limited in its application as only clerical errors and slips can be corrected. The inclusion of 13.5% interest pa in the judgment can hardly be described as an error as the plaintiff had intended all along to claim that rate of interest after judgment as expressed in the statement of claim. However, by virtue of O 2 rr 1 and 2, the court is still empowered to cure such a judgment provided that the first defendant will not be in any way prejudiced by such an amendment.

The first defendant has already applied to have the same judgment set aside and the matter was pending when the appeal was heard. Since the amendment does not have the effect of preventing the first defendant from proceeding with its application, it cannot be said that the first defendant will be unduly prejudiced by the amendment. What the amendment seeks to do is to correct an otherwise regular judgment, a jurisdiction derived under O 2 r 1 and under the inherent jurisdiction of the court. On that finding, I had dismissed the first defendant's appeal with costs.

Order accordingly.

Solicitors: *Krishnan & Co*; *Rashid & Lee.*

Reported by *Ng Sheau Jiuan*

Yeap Chooi Peng v P Manogram a/l V Packirisamy

HIGH COURT (KUALA LUMPUR) – DIVORCE PETITION NO 47-165-87
SITI NORMA YAAKOB J
2 AUGUST 1988

Family Law – Divorce petition – Respondent's answer not filed on hearing dates – Decree nisi given in respondent's absence – Application to set aside decree nisi subsequently filed – Application only served on petitioner after decree had been made absolute – Whether respondent's tardy conduct justified setting aside decree absolute

The petitioner filed a divorce petition and the petition was set down for hearing on 16 July 1987. On that date the respondent asked for time to file an answer and the hearing was adjourned to 23 July 1987. At the second hearing on 23 July 1987, the respondent still had not filed any answers and the hearing was adjourned again to 13 August 1987. At the third hearing on 13 August 1987, only the petitioner and her counsel were present. In the respondent's absence, the court granted the decree nisi. The respondent then filed an application on 28 August 1987 to have the decree nisi set aside and that the petition be reheard afresh. However, the application was only served on the petitioner's solicitors three months later on 23 November 1987, by which time the decree had already been made absolute.

Held, dismissing the application: Although the respondent's solicitors acted fast enough to file the application, they, however, dragged their feet in serving the application on the petitioner's solicitors. Since the decree nisi has already been made absolute and for all intents and purposes the parties are already divorced, the respondent has to give good and valid reasons why he had failed to file an answer. The respondent's tardy conduct does not justify the court setting aside the decree absolute that had been regularly obtained.

G Davidason for the respondent/applicant.
Balwant Singh Sidhu for the petitioner/respondent.

Cur Adv Vult

Siti Norma Yaakob J: The parties to this petition were married on 26 July 1977 and three children were born